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# LAW & POLITICS

## REORDERING THE PRIORITIES OF THE FBI IN LIGHT OF THE END OF THE COLD WAR

DON EDWARDS\*

### I. INTRODUCTION

In San Diego early last year, due to a lack of agents assigned to white collar crime, the Federal Bureau of Investigation ("Bureau" or "FBI") was unable to investigate bank fraud cases involving losses of less than one million dollars.<sup>1</sup> Nationwide, the Bureau had 21,000 unaddressed referrals of possible savings and loan fraud, and at least 2,400 inactive financial crimes investigations.<sup>2</sup> In 1989, the FBI had the resources to investigate only forty percent of the drug trafficking organizations that it had identified.<sup>3</sup>

Yet at the same time, the Bureau sent an agent to the home of a 73-year-old grandmother in Phoenix to ask why she had written a letter to the Soviet embassy.<sup>4</sup> She told them that she wanted to

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\* Member of the House of Representatives (D—California); Chairman, Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary. I gratefully acknowledge the invaluable contribution of Subcommittee Assistant Counsel, James X. Dempsy, in the preparation of this Article.

<sup>1</sup> *FBI Oversight and Authorization Request for Fiscal Year 1991: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 437-38 (1990) [hereinafter *FBI Oversight—1991*] (testimony of FBI Director William S. Sessions).

<sup>2</sup> THE U.S. GOVERNMENT'S WAR AGAINST FRAUD, ABUSE, AND MISCONDUCT IN FINANCIAL INSTITUTIONS: WINNING SOME BATTLES BUT LOSING THE WAR, REPORT OF THE HOUSE COMM. ON GOVERNMENT OPERATIONS, H.R. REP. NO. 982, 101st Cong., 2d Sess. 24 (1990).

<sup>3</sup> *FBI Oversight and Authorization Request for Fiscal Year 1990: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 180 (1989) (testimony of FBI Assistant Director Floyd I. Clarke).

<sup>4</sup> Montini, *FBI Visit on Letter, Soviet Magazine Makes Grandma See Red*, ARIZ. RE-

thank the Soviets for sending an icebreaker to free two whales trapped in an Alaskan icecap. As part of the same program, the FBI has sent agents, sometimes in teams, to interview schoolchildren who had written to the Soviet embassy seeking information for class projects, Amnesty International members who had written on behalf of political prisoners, and a retiree who had asked the Soviet consulate in San Francisco for brochures on group tours of the Soviet Union.<sup>5</sup> From 1985 through 1987, under the related "Library Awareness Program," the FBI sent agents into university libraries asking for information on foreign nationals who were reading technical journals.<sup>6</sup> And in the mid-1980's, the Bureau interviewed approximately one hundred American travelers to Nicaragua, including a number involved in humanitarian efforts.<sup>7</sup>

The FBI, the nation's premier law enforcement agency, is also our lead domestic counterintelligence agency. At its core, counterintelligence involves identifying and neutralizing unlawful espionage, sabotage, or terrorism efforts of foreign powers. But the FBI's counterintelligence efforts never have been confined to the investigation of illegal activities. The FBI has long claimed the authority to investigate lawful activities—including the first amendment activities of United States citizens—involving contact with or support for a foreign nation or group.<sup>8</sup>

Lacking a clear-cut focus on criminal conduct, the FBI's counterintelligence jurisdiction has justified many of the Bureau's most troublesome intrusions on first amendment rights. In the 1960's and 1970's, the FBI maintained the dangerous COINTELPRO program<sup>9</sup> and waged a shameful campaign against Martin

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PUBLIC, Apr. 7, 1989, reprinted in *FBI Investigation of First Amendment Activities: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 89 (1989) [hereinafter *Subcomm. Hearings on FBI Investigation of First Amendment Activities*].

<sup>5</sup> See *Subcomm. Hearings on FBI Investigation of First Amendment Activities*, *supra* note 4, at 85-111.

<sup>6</sup> *FBI Counterintelligence Visits to Libraries: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 3 (1988) [hereinafter *FBI Library Visits*] (testimony of Duane Webster, Executive Director, Association of Research Libraries).

<sup>7</sup> *FBI Authorization Request for Fiscal Year 1986: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 7-18, 22, 29-30 (1986) (testimony of then FBI Director William H. Webster).

<sup>8</sup> See *infra* notes 31-36 and accompanying text.

<sup>9</sup> Among COINTELPRO's operations was COINTELPRO-New Left, which was directed against college campus groups and opponents of America's involvement in the Vietnam conflict. The operation was so vaguely defined that it resulted in the targeting of legiti-

Luther King.<sup>10</sup> More recently, the FBI's investigation of the Committee in Solidarity with the People of El Salvador ("CISPES") became, by the FBI's own admission, wastefully overbroad, as it compiled information on thousands of innocent individuals and peaceful groups.<sup>11</sup>

The breathtaking changes in East-West relations have generated a reexamination of the shape and mission of United States military and foreign intelligence programs.<sup>12</sup> The war in the Persian Gulf, which brought together as partners, at least temporarily, the United States and the Soviet Union, confirms the significance of the Berlin Wall's demolition. War and conflict will still exist, and new threats to United States national security will be identified, but the strategies and principles that guided the Pentagon, and the Central Intelligence Agency ("CIA") since the end of World War II have become obsolete. Consequently, there is now a serious effort underway to reexamine and reorder America's national security policy in light of the dissolution of the East Bloc

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mate, non-violent anti-war groups. Another aspect was COINTELPRO-Black Nationalist, which targeted Black civil rights groups, including ones involved exclusively in non-violent political expression. *See generally* SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT, Book II: Intelligence Activities and the Rights of Americans and Book III: Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, S. REP. NO. 755, 94th Cong., 2d Sess. 163 (1976) [hereinafter CHURCH COMM. REP.].

<sup>10</sup> *Id.* Book III, at 79-184.

<sup>11</sup> The CISPES organization, founded in the early 1980's, protested against United States aid to the anti-communist government of El Salvador. Based on CISPES' alleged links to Salvadoran rebels, the FBI conducted two investigations of CISPES between 1981 and 1985. *See* notes 56-64 and accompanying text. *See generally* CISPES and FBI Counterterrorism Investigations: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 100th Cong., 2d Sess. 116-20 (1988) [hereinafter *House Subcomm. Hearings on CISPES*] (testimony of FBI Director William S. Sessions); THE FBI AND CISPES, REPORT OF THE SENATE SELECT COMM. ON INTELLIGENCE, S. REP. NO. 46, 101st Cong., 1st Sess. 1-7 (1989) [hereinafter SENATE INTELLIGENCE COMM. REP. ON CISPES]; *The FBI Investigation of CISPES: Hearings Before the House Permanent Select Comm. on Intelligence*, 100th Cong., 2d Sess. 1, 5-6 (1989).

<sup>12</sup> "[T]his year's authorization bill does, in fact, reflect the beginning of a process to reorder priorities and objectives of U.S. intelligence activities." SENATE COMM. ON INTELLIGENCE, INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 1991, S. REP. NO. 358, 101st Cong., 2d Sess. 3 (1990) [hereinafter SENATE INTELLIGENCE COMM. REP. NO. 358]; *see also* 136 CONG. REC. S12299-12302 (daily ed. Aug. 3, 1990) (comments by Chair and Vice Chair of Senate Intelligence Committee); HOUSE PERMANENT SELECT COMM. ON INTELLIGENCE, INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 1991, H.R. REP. NO. 725, PART I, 101st Cong., 2d Sess. 4-5 (1990) [hereinafter HOUSE INTELLIGENCE COMM. REP. NO. 725] (shift of intelligence community's focus away from Soviet threat toward other national security concerns).

and the end of the Cold War.<sup>13</sup> It is time for a similar rethinking and reordering of priorities and resources domestically—starting with the FBI.

The Cold War had a home front. For nearly fifty years, the United States maintained a domestic security apparatus based in part on the belief that foreign ideas posed as real a threat to our nation as foreign armies. Focusing on ideology, the apparatus often assumed that opposition to government policies sprung not from the thoughtful convictions of American citizens, but from foreign instigation; expressions of political support for the goals of violent insurgencies abroad were thus understood to manifest an intention to use violence in this country.

Quite contrary to our professed belief in the self-reliance and good sense of an informed American public, the security apparatus reflected a fear that domestic institutions and public opinion could be subverted easily by foreign influence. Any contact between an American and a representative of certain nations or factions, as the theory went, was a potential avenue for subversion. Therefore, all contacts required scrutiny. This concept was reiterated as recently as February of 1988, when, in a report justifying its Library Awareness Program, the FBI stated, that "[T]he FBI must logically pursue any contact between a Soviet national and an American citizen, regardless of where the contact occurs or the profession of the person contacted, and that would include libraries as the circumstances might require."<sup>14</sup>

For much of this period, the Soviet Union and communism were seen as the greatest possible threat. In response to White House pressure the intelligence community scrutinized opponents of the Vietnam conflict and supporters of nuclear arms control for evidence of foreign direction or manipulation.<sup>15</sup> More recently, for-

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<sup>13</sup> See *supra* note 12 (legislative materials examining need for reordering priorities of U.S. intelligence agencies); see, e.g., Maynes, *America Without the Cold War*, 78 FOREIGN POL'Y 3, 13 (1990) (discussing priorities of post-containment foreign policy); Lardner, *CIA Struggles to Define Its Post-Cold War Role*, Wash. Post, Nov. 13, 1990, at A1, col. 1 (debate over new intelligence priorities); Moynihan, *The Peace Dividend*, N.Y. Rev. of Books, June 28, 1990, at 3 (Cold War's termination offers opportunity to move from national security state to a more open government).

<sup>14</sup> U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, THE KGB AND THE LIBRARY TARGET, 1962-PRESENT 32 (February 1988), reprinted in *FBI Library Visits*, *supra* note 6, at 277; see *infra* notes 79-80 and accompanying text (discussion of Library Awareness Program).

<sup>15</sup> CHURCH COMM. REP. BOOK III, *supra* note 9, 679-732; Public Papers of the Presidents of the United States: Ronald Reagan, 1982, Book II 1455, 1595 (1983); 129 Cong. Rec.

eign insurgency and terrorism (often allegedly Communist-inspired or Soviet-supported) have provided added justification for the continuation—and indeed, *expansion*—of the domestic security apparatus. Groups that opposed United States foreign policy in Central America have undergone investigation on the ground that they were acting on behalf of rebel groups.<sup>16</sup>

I strongly disagree that communism, terrorism, or any other anti-democratic ideology has ever seriously threatened a nation confident in its own democratic values; I just as strongly dispute that it was ever necessary to curtail freedom in order to protect it. But certainly neither the premise nor its corollary should serve as the basis for policy today. Whatever might be the threat from the Soviet Union or any other nation or group in the foreseeable future, the threat is not ideological. Communist or revolutionary ideology no longer exerts a sinister attraction, if ever it did; and the American public no longer needs to be protected from contacts with Communists—Soviet or Cuban—Palestinians or foreigners of any national or ideological stripe.

Not only has the theoretical basis of the domestic Cold War lost its force, but it would seem that purely pragmatic considerations would make it impossible for the FBI to maintain the type of approach typified by the Library Awareness Program or the program that included the interviews of Amnesty International members; too many contacts exist between United States citizens and foreign nationals for the FBI to scrutinize each one in search of spies or terrorists. For instance, five years ago, 7,600 Soviet visitors came to the United States. In 1988, approximately 35,000 arrived. In 1989, the number of visitors rose to nearly 60,000, and should have approached 100,000 in 1990.<sup>17</sup> The number of visitors from the People's Republic of China is even greater. The task of monitoring all these visitors and their contacts with Americans, an effort that was probably spotty when the numbers were far smaller, has become logistically impossible.

Throughout much of its history, the FBI has been able to find authorization for a broad counterintelligence mission in directives—however vaguely worded—from successive Presidents and Attorneys General, as well as in signals from Capitol Hill. Those

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H1793-97 (Mar. 24, 1983).

<sup>16</sup> See *supra* note 11 and accompanying text.

<sup>17</sup> *FBI Oversight—1991*, *supra* note 1, at 439.

directives had no explicit basis in statute or the Constitution, but it would be a mistake to argue that the FBI today is acting illegally. My concern is that the FBI claims that its foreign counterintelligence and international terrorism responsibilities encompass the authority to investigate the first amendment activities of Americans not suspected of criminal conduct; there is no clear statutory or constitutional limitation on the source for, or the scope of that authority. I believe, however, that legislative limits, through the use of a criminal standard, offer the best hope for defining the FBI's authority and keeping it focused on crime, not ideology.

I am not proposing that we leave ourselves defenseless; no one wants to jeopardize the nation's security against hostile foreign intelligence efforts or international terrorism. Rather, the reforms outlined below would make the FBI more effective and would better protect the nation because resources would be focused on genuinely dangerous activity: espionage and acts of violence.

The coincidence of the Cold War's end and the bicentennial of the ratification of the Bill of Rights should provide the opportunity to clarify finally the FBI's mission and the government's power over the political activities of its citizens. In an era of vastly expanded East-West exchanges, it is absurd to contend that the FBI "must logically pursue any contact between a Soviet national and an American citizen" to identify espionage threats or terrorists. The end of the Cold War offers an opportunity to break the link between ideology and national security, and finally to direct the domestic counterintelligence apparatus away from ideology to criminal activity. This "peace dividend" will not be manifested in budgetary terms but rather in a releasing of the nation from government policies that have constricted freedom of speech and association in the name of protecting those freedoms from foreign assault.

## II. PROPOSED EXPANSIONS IN THE FBI'S COLD WAR POWERS

Ironically, rather than refocusing the priorities of the FBI in light of the Cold War's end, we are confronting proposals to expand the mission and powers of the national security apparatus. The war with Iraq posed serious threats to civil liberties, as has international conflict throughout American history. Some of the early steps taken by the FBI were disturbing. On January 7, 1991, a week before the United Nations deadline for Iraqi withdrawal

from Kuwait, FBI agents across the country began to visit American citizens of Arabic heritage to ask whether they knew of planned terrorist activities.<sup>18</sup> Many of those interviewed were politically active and some were asked questions about their support of the war.<sup>19</sup> The FBI began a separate effort to locate Arab nationals who had overstayed their visas, which raised concerns, thus far unrealized, about broader contingency plans for detention of aliens.<sup>20</sup>

Even before Iraq's invasion of Kuwait, the intelligence community was busy identifying new threats, based on an expanded definition of national security, that would justify the continued existence of the Cold War apparatus. For example, within the past four years, we have seen the increasing use of the intelligence agencies in the war on drugs. Now government and academic sources have argued that the warming of relations with Moscow requires an expansion, rather than a diminution of intelligence efforts.<sup>21</sup> There is now discussion of involving the intelligence agencies more extensively in the collection of economic intelligence, and using the FBI to combat foreign efforts to obtain high-tech information.<sup>22</sup> One commentator has gone so far as to suggest that the CIA should begin covering environmental issues!<sup>23</sup>

According to a press report, in October of 1990, President Bush signed National Security Directive 147, directing the FBI and other intelligence agencies to continue "rebuilding" their counterintelligence programs. Reportedly, the secret five-page directive was based on a year-long interagency review of security threats and vulnerabilities.<sup>24</sup>

The Senate Intelligence Committee, rather than seeking a re-

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<sup>18</sup> Belkin, *For Many Arab-Americans, FBI Scrutiny Renews Fears*, N.Y. Times, Jan. 12, 1991, at 1, col. 4; LaFraniere, *FBI Starts Interviewing Arab-American Leaders*, Wash. Post, Jan. 9, 1991, at A14, col. 1.

<sup>19</sup> LaFraniere, *supra* note 18.

<sup>20</sup> Such treatment of Arab-Americans raises the spectre of the internment of Japanese Americans during World War II. See *Korematsu v. United States*, 323 U.S. 214, 219 (1944) (upholding Executive Order restricting from West Coast all those of Japanese ancestry, regardless of citizenship or loyalty); cf. Matsuda, *No Business as Usual: Racism and Gender*, 3 YALE J.L. & FEMINISM (forthcoming 1991) (likening current efforts against Arab-Americans to internment of Japanese Americans during second World War).

<sup>21</sup> Lardner, *supra* note 13.

<sup>22</sup> See HOUSE INTELLIGENCE COMM. REP. NO. 725, *supra* note 12, at 5; SENATE INTELLIGENCE COMM. REP. NO. 358, *supra* note 12, at 10.

<sup>23</sup> Carver, *Intelligence in the Age of Glasnost*, 69 FOREIGN AFF. 147, 155 (1990).

<sup>24</sup> Gertz, *Despite Thaw in Cold War, Bush Heats up Counterspy Operations*, Wash. Times, Oct. 24, 1990, at A1, col. 4.



allocation of resources from less critical and less productive efforts, recently urged the Administration to seek a supplemental appropriation to provide additional resources for the FBI's fiscal year 1991 counterintelligence program to meet the requirements for implementation of arms control inspection agreements.<sup>25</sup>

The FBI seeks broadened authority to use the so-called "national security letter" to obtain—without a warrant—phone records and credit records on persons suspected of being agents of foreign powers, even if they are not suspected of being involved in illegal activities. This information would allow the FBI to identify even more contacts between Americans and Soviets, leading to even more fruitless visits of innocent citizens.

A panel of experts recently presented to the Senate Intelligence Committee a report on proposed changes in the counterintelligence laws.<sup>26</sup> The panel recommended expanding the use of the polygraph,<sup>27</sup> requiring employees with special security clearances to waive their privacy rights, and authorizing a secret court to approve physical searches ("black bag jobs") without probable cause to believe that a crime has been committed. The panel also endorsed the FBI's request for broader authority to obtain credit reports and telephone toll records without a subpoena where no criminal conduct was suspected.<sup>28</sup>

### III. SOURCES OF—AND LIMITS ON—THE FBI'S AUTHORITY

In 1978, Attorney General Griffin Bell testified that "[d]espite its long history, the Bureau has received very little statutory guidance."<sup>29</sup> Unfortunately, that remains unchanged; there is no legislative charter for the FBI. As when Attorney General Bell testified, there are now only three provisions defining the FBI's duties.<sup>30</sup>

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<sup>25</sup> SENATE INTELLIGENCE COMM. REP. NO. 358, *supra* note 12, at 8.

<sup>26</sup> Letter of Eli S. Jacobs to David L. Boren & William S. Cohen, Chair and Vice-Chair of the Senate Select Committee on Intelligence (May 23, 1990) (transmitting thirteen legislative proposals "to improve the counter-intelligence of the United States").

<sup>27</sup> Cf. 29 U.S.C. §§ 2006(b) & (c) (1988) (exempting federal government from prohibition of polygraph use in employment setting when performing intelligence or counterintelligence functions).

<sup>28</sup> See *Senate Hearing on Counterintelligence*, *supra* note 26.

<sup>29</sup> *FBI Statutory Charter: Hearings Before the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 4 (1978) (testimony of Attorney General Griffin B. Bell).

<sup>30</sup> See 28 U.S.C. §§ 533, 534 (1988); 42 U.S.C. § 3744 (1988); see also 28 U.S.C. §§ 535, 540 (1988) (Attorney General and FBI may investigate crimes involving government employees).

These provisions authorize the FBI to detect and prosecute offenses against the United States, assist in the protection of the President, investigate matters under the control of the Department of Justice and Department of State,<sup>31</sup> collect crime records and exchange them with federal, state, and local agencies,<sup>32</sup> and provide training for state and local law enforcement. A fourth statutory provision authorizes FBI agents to carry firearms, serve warrants, and make arrests.<sup>33</sup>

The substantive espionage laws<sup>34</sup> provide some guidance for the FBI's counterintelligence investigations. But the Bureau has long pursued a broader mission in which it has examined lawful contacts between citizens of the United States and those of certain foreign nations; it has also investigated the lawful activities of domestic groups that oppose United States foreign policy or "support" certain foreign governments or factions. It is not the FBI's fault that this mission was never well defined; the mission stemmed from a vague series of presidential directives predating World War II, statutes of questionable constitutionality such as the seditious conspiracy law, and Attorney General guidelines classified as "secret."<sup>35</sup>

The first substantial domestic intelligence programs of the federal government<sup>36</sup> were established during World War I, when thousands of individuals were investigated by the Bureau of Investigation for "un-American activities." In the period immediately following World War I, the investigations continued, culminating in the notorious Palmer Raids.<sup>37</sup>

An effort to narrow the FBI's focus was made by Harlan Fiske

<sup>31</sup> See 28 U.S.C. § 533 (1988) (Attorney General may appoint investigative officials).

<sup>32</sup> See *id.* § 534 (Attorney General shall acquire crime identification and other records).

<sup>33</sup> See 18 U.S.C. § 3052 (1988); 42 U.S.C. § 3744 (1988) (FBI director authorized to establish training programs).

<sup>34</sup> See 18 U.S.C. §§ 791-798 (1988) (espionage and censorship chapter makes unlawful, *inter alia*, to harbor spies, gather defense information, and photograph defense installations).

<sup>35</sup> See *infra* notes 40-43 and accompanying text.

<sup>36</sup> See CHURCH COMM. REP. BOOK II, *supra* note 9, at 23-67; *FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary Part II*, 94th Cong., 1st and 2d Sess. 167-68 (1976) (citing GENERAL ACCOUNTING OFFICE, FBI DOMESTIC INTELLIGENCE OPERATIONS—THEIR PURPOSE AND SCOPE: ISSUES THAT NEED TO BE RESOLVED); see also *Socialist Workers' Party v. Attorney Gen.*, 642 F. Supp. 1357, 1375-77 (S.D.N.Y. 1986) (summary of history relating to FBI's investigation of SWP).

<sup>37</sup> See generally Comment, *Ideological Exclusion, Plenary Power, and the PLO*, 77 CALIF. L. REV. 831, 837-39 (1989) (discussing Palmer Raids in which aliens were deported).

Stone, who became Attorney General in 1924. Describing the Bureau's activities before he took office as "lawless, maintaining many activities which were without any authority in federal statutes,"<sup>38</sup> Stone pledged to limit the FBI to investigating only such conduct as is made criminal by the laws of the United States. Upon appointing J. Edgar Hoover as acting director of the Bureau of Investigation (as the FBI was then called), Stone directed that the activities of the Bureau were to be "limited strictly to investigations of violations of the law."<sup>39</sup>

The constraints imposed by Stone were never embodied in legislation and proved to be short-lived. Beginning in the mid-thirties, domestic intelligence activities were reinstituted and expanded. President Roosevelt, in a series of oblique and conflicting orders, directed the FBI to collect intelligence about "subversive activities" and "potential crimes."<sup>40</sup> In the exercise of this jurisdiction, the FBI's activities went beyond investigation of crimes to scrutinize foreign involvement in American affairs. The FBI began to investigate law abiding domestic groups and individuals.

The intelligence programs of the FBI did not cease with the end of the second World War. Instead, they set a pattern for decades to come. Executive directives by Presidents Truman and Eisenhower continued to direct the FBI to investigate "subversive activity" without defining what that might be<sup>41</sup> and President Kennedy took actions that continued the Truman and Eisenhower orders.<sup>42</sup> The FBI concluded that its internal security responsibility went beyond statutory authority. In the 1960's and 1970's, intelligence gathering related to protest activity was generally increased in response to vague requests by Presidents, Attorneys General, and other officials.<sup>43</sup>

In addition and parallel to the executive orders described above, the FBI has found authority to conduct intelligence investigations in a number of broad criminal statutes that may be of questionable constitutionality.<sup>44</sup> In the past, the FBI has con-

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<sup>38</sup> CHURCH. COMM. REP. Book II, *supra* note 9, at 23.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 24.

<sup>41</sup> *Id.* at 45-46.

<sup>42</sup> *Id.* at 46.

<sup>43</sup> *Id.* at 46-163.

<sup>44</sup> See 18 U.S.C. § 2384 (seditious conspiracy); *id.* § 2385 (advocating overthrow of government—Smith Act); *id.* § 2386 (Voorhis Act) (1988); 50 U.S.C. §§ 781-789 (1988) (Internal Security Act of 1950 and Communist Control Act of 1954). *But see* *Scales v. United States*,

ducted massive investigations of lawful political activity premised on the violation of conspiracy statutes such as the Smith Act and Voorhis Act, which facially punish speech and advocacy.

Despite the revelations regarding COINTELPRO and other excesses, and contrary to the recommendations of the Church Committee, legislation was never adopted to define the FBI's responsibilities. Consequently, the source of the FBI's authority is still based on Executive Order and Attorney General guidelines, and the FBI continues to claim authority to investigate legal activities of United States citizens.<sup>45</sup>

Two sets of Attorney General guidelines were adopted after the investigations of the Church and Pike Committees: one concerned domestic intelligence or domestic security, and the other concerned foreign intelligence, counterintelligence, and international terrorism.<sup>46</sup> The former are unclassified; the latter remain largely classified.

In one of the most significant reforms to emerge from that era, the Attorney General guidelines on domestic security cases adopted a criminal standard.<sup>47</sup> The standard currently provides:

A domestic security/terrorism investigation may be initiated when the facts or circumstances reasonably indicate that two or more persons are engaged in an enterprise for the purpose of furthering political or social goals wholly or in part through activities

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367 U.S. 203, 224-30 (1961) (membership clause of Smith Act which makes it felony to belong to organization which advocates overthrow of government held not to violate first or fifth amendments); *Yates v. United States*, 354 U.S. 298, 303-11 (1957) (convictions for conspiring to organize group advocating overthrow of government reversed—word "organize" should be strictly construed); *Dennis v. United States*, 341 U.S. 494, 516 (1951) (sections of Smith Act which make it crime to advocate overthrow of government do not violate first or fifth amendments); *United States v. Rodriguez*, 803 F.2d 318, 320 (7th Cir. 1986) (seditious conspiracy statute held not to conflict with treason clause of Constitution), *cert. denied*, 480 U.S. 908 (1987).

<sup>45</sup> It would be incorrect to argue that nothing has changed since COINTELPRO. See *supra* note 9. The reforms adopted following the investigations of the Church and Pike Committees represent genuine improvements in the operations of the FBI and brought about significant reductions in the level of resources devoted to ideological subversion. For example, congressional oversight investigations of the past decade have uncovered none of the "dirty tricks" that characterized COINTELPRO.

<sup>46</sup> See *infra* notes 47-48 and accompanying text.

<sup>47</sup> See *FBI Domestic Security Guidelines: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 60-66 (Levi guidelines), 67-85 (Smith guidelines) (1983). The guidelines were originally promulgated by Attorney General Edward Levi in 1976. Although revised by Attorney General William French Smith in 1983 and updated in 1989, the guidelines retain the criminal standard.

that involve force or violence and a violation of the criminal laws of the United States.<sup>48</sup>

Since 1976, all investigations of domestic terrorist groups—the “New Left,” Puerto Rican nationalists, the Jewish Defense League, and white supremacist groups—have been conducted under this criminal standard. The number of domestic security/terrorism cases has dropped dramatically, while the success of the FBI’s efforts has increased with the more focused approach. The number of terrorist incidents in the United States has decreased from over one hundred eleven in 1977 and sixty-nine in 1978, to only nine in 1987, eight in 1988, four in 1989, and five in 1990.<sup>49</sup>

In contrast, foreign counterintelligence and international terrorism investigations were left under broadly defined standards in a separate set of guidelines. The guidelines and the Executive Order<sup>50</sup> on which they are based permit, under a wide variety of circumstances, the surveillance of Americans not even suspected of breaking the law. They reassert precisely the reasoning used by the FBI for its surveillance of Martin Luther King, Jr. and the anti-Vietnam War movement.

While most of the Attorney General guidelines on foreign counterintelligence and international terrorism are classified, enough of the definitions section is unclassified to appreciate the scope of the authority granted to the FBI. Under the guidelines, the FBI is authorized to investigate “intelligence activities,” defined to include any activity undertaken for or on behalf of a foreign power to affect political or governmental processes in the United States. A foreign power is defined to include a foreign government or any of its component, a faction of a foreign nation, a foreign-based political organization, and a group engaged in international terrorism or preparatory activities.<sup>51</sup> The Palestinian Liberation Organization, the African National Congress, the Farabundo Marti National Liberation Front, and opposition political parties abroad are thus all foreign powers, and anything done

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<sup>48</sup> *Id.* at 79.

<sup>49</sup> FBI, ANALYSIS OF CLAIMED TERRORIST INCIDENTS IN THE U.S. (1981); FBI, TERRORISM IN THE UNITED STATES (1989); see also Data submitted to the Subcommittee on Civil and Constitutional Rights by the FBI (on file with subcommittee).

<sup>50</sup> Exec. Order No. 12333, 46 Fed. Reg. 59,941 (1981); see *Executive Order on Intelligence Activities: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 101 (1981 & 1982).

<sup>51</sup> Attorney General Guidelines for FBI Foreign Intelligence Collection & Foreign Counterintelligence Investigations (April 1983).

in the United States for or on their behalf is potentially the target of a counterintelligence investigation. The guidelines expressly state that no United States person (defined as a citizen or permanent resident alien) may be considered an agent of a foreign power "solely upon the basis of activities protected by the first amendment,"<sup>52</sup> but it appears that conclusory allegations based on evidence of foreign influence can suffice to overcome that limitation.

The FBI has interpreted the guidelines as authorizing the investigation of individuals who are members in or who support a foreign organization that engages in both legal political and illegal terrorist activities. As the CISPES case demonstrates, once a group is deemed terrorist, the FBI does not closely distinguish among the activities of its members or supporters. The FBI may investigate one's membership in, or recruitment, fundraising or support for an organization, regardless of whether one participates in the organization's illegal activity.<sup>53</sup> Such an approach runs counter to the line of cases in which the Supreme Court has held that the first amendment protects membership in or affiliation with an organization having both legal and illegal aims, unless the individual specifically intends to further the group's illegal aims.<sup>54</sup>

The definition of international terrorist in the guidelines includes one who knowingly aids or abets any person engaged in violent criminal acts. The concept of aiding and abetting was, however, interpreted by the FBI in the CISPES case to cover a broad category of "support" activities for groups that are deemed to engage in terrorism, whether or not the support is legal.<sup>55</sup> In addition,

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<sup>52</sup> *Id.*

<sup>53</sup> Congress did little to clarify this issue when, in the Immigration Act of 1990, it defined "engag[ing] in terrorist activity" to mean "commit[ting], in an individual capacity or as a member of an organization, an act of terrorist activity," including the "soliciting of funds or other things of value . . . for any terrorist organization. Pub. L. No. 101-649, § 601(a)(3)(B)(iii), 104 Stat. 4978, 5070 (1990) (emphasis added) (amending § 212(a)(3)(B)(iii) of the Immigration and Nationality Act).

<sup>54</sup> See *Healy v. James*, 408 U.S. 169, 187 (1972); *Keyishan v. Board of Regents*, 385 U.S. 589, 606-07 (1967). But see *Palestine Information Office v. Schultz*, 853 F.2d 932, 939-42 (D.C. Cir. 1988) (first amendment not implicated by order shutting down foreign mission's office funded solely by and representing only one foreign entity). This last case, however, should not be read as implicitly approving the investigation of groups receiving domestic funding and representing domestic members.

<sup>55</sup> See *supra* notes 9-11 and accompanying text. In 1984, the FBI carried out an extensive investigation of alleged members of the Popular Front for the Liberation of Palestine who were living in Los Angeles. That investigation included secret electronic surveillance under the Foreign Intelligence Surveillance Act. FBI Director Webster testified that the individuals were not themselves involved in terrorist activities and were not subject to arrest

a group engaged in international terrorism is by definition a foreign power, so political activities undertaken on its behalf—such as fundraising or leafletting—could fall under the definition of intelligence activities subject to investigation.

Whatever the guidelines' ambiguities, there is now considerable evidence that they have not been narrowed in practice. In terms of international terrorism, the FBI has not sought to link domestic subjects to specific terrorist acts abroad and has not predicated its investigations on suspicion of any criminal activity. Instead, it has focused on links or associations, sometimes several stages removed. The result has been the investigation of United States organizations and individuals whose support for a foreign group is ideological and legal. In terms of counterintelligence, the FBI has sought to monitor the collection of even unclassified information by foreign governments and the entire range of contacts between Americans and foreign officials.

#### IV. RECENT ABUSES OF COUNTERINTELLIGENCE AUTHORITY

##### A. CISPES

The FBI has investigated CISPES twice: a preliminary inquiry conducted in 1981-82 under the Foreign Agents Registration Act, and a more extensive examination conducted from 1983-85 as an international terrorism investigation. As a result of the latter case, the FBI gathered and added to its files information on approximately 2,375 individuals and 1,330 groups.<sup>56</sup> During the course of the investigation, which involved all of the FBI's field offices, agents took thousands of photographs at peaceful demonstrations, surveilled rallies on college campuses, attended a mass at a university, surveilled churches and church groups, sent an informant to numerous meetings, rummaged through trash, collected mailing lists, took phone numbers off posters opposing intervention in Central America, recorded license plate numbers of vehicles parked outside public meetings, and obtained long distance billing records from telephone companies.

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for criminal activities, but that the investigation nonetheless was properly predicated under the Attorney General guidelines. *Nomination of William H. Webster to be Director of Central Intelligence: Hearings Before the Senate Select Comm. on Intelligence*, 100th Cong., 1st Sess. 94-95 (1987).

<sup>56</sup> SENATE INTELLIGENCE COMM. REP. ON CISPES, *supra* note 11, at 2.

The investigation produced 178 "spin-off" investigations of groups and individuals. In four of the group cases, the investigation appears to have been based solely on the group's ideological similarity to or association with CISPES.<sup>57</sup> Three other groups were targeted because the FBI believed them to be CISPES chapters, regardless of their different names. The FBI pursued another group, the Birmingham Committee in Solidarity with Central America ("BCSCA"), without an initial predicate; moreover, although the file indicated that agents failed to establish any connection between CISPES and BCSCA, the Birmingham FBI office received its headquarter's approval to obtain BCSCA's telephone toll records because of an assertion that BCSCA was identical to CISPES.<sup>58</sup> Spin-off investigations of individuals were apparently initiated solely on the basis of attendance at the showing of a CISPES-sponsored film, the appearance of names on lists of participants at CISPES conferences, and similar associations. In one case, the FBI targeted a Xavier University professor on the basis of an exam question and a speaker that he had invited to class.<sup>59</sup>

Overall, the CISPES investigation and spin-offs generated a nearly comprehensive picture of grass-roots opposition to United States policy in El Salvador. It produced no reliable information of planned violence or other illegal activity.

Widespread probing of lawful dissent occurred despite memoranda from FBI headquarters warning field offices to avoid infringing first amendment rights. In July of 1984, more than a year after the investigation's commencement, headquarters sent a ten page memorandum to all involved offices "to reiterate . . . guidelines and instructions for these investigations."<sup>60</sup> Headquarters noted that "some offices have reported information recently regarding political statements and political lobbying . . . . Political activities or political lobbying . . . are not, repeat not, targets of this investigation and should not be monitored."<sup>61</sup>

With such explicit instructions, how could the CISPES case have occurred? The answer, in my view, lies in the lack of a clear-cut focus for FBI counterintelligence and international terrorism cases. The focus of the CISPES cases was simply not the investiga-

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<sup>57</sup> *Id.* at 5, 6-7, 82-84.

<sup>58</sup> *Id.* at 85.

<sup>59</sup> *Id.* at 6.

<sup>60</sup> *House Subcomm. Hearings on CISPES*, *supra* note 11, at 396-403.

<sup>61</sup> *Id.*



tion of crimes; indeed, in the few instances where the FBI received information concerning possible violent activity, agents failed to pursue the allegations. Instead, the inquiry expanded in an effort to identify all possible CISPES chapters, activities, and associations. While the FBI headquarters advised field offices not to monitor first amendment activities, other memoranda directed agents to identify CISPES members and activities. Since many CISPES chapters only engaged in the planning and staging of meetings and demonstrations, agents in the field were understandably confused. For example, when its investigation of the local CISPES chapter turned up contacts with an order of Catholic nuns, the Cincinnati office asked headquarters "to furnish Cincinnati with guidelines regarding investigations of captioned matter, *vis-a-vis* religious organizations—specifically the Roman Catholic Church."<sup>62</sup>

The Denver office, two weeks after receiving the July 1984 memorandum instructing that political activity should not be monitored, sent headquarters a memorandum stating "that in spite of attempts by the Bureau to clarify guidelines and goals for this investigation, the field is still not sure of how much seemingly legitimate political activity can be monitored."<sup>63</sup> The Cleveland FBI office, on August 29, 1984, circulated a report on a public conference to be held in Cleveland, sponsored by unions, religious groups, and CISPES. The Cleveland report listed the planned speakers at the conference and the topics they would be addressing, including "The 1984 Elections" and "Winning the Labor Movement to Non-Intervention." The memorandum concluded that "Cleveland plans to follow the progress of the conference."<sup>64</sup>

Without the guidance of a criminal standard, the headquarters directives could not effectively prevent the monitoring of political activity. With only the guidance of broad concepts like "support for terrorism" or "foreign direction or control," agents would investigate whatever activities CISPES engaged in: meetings, rallies, and grass-roots organizing. Restricting surveillance to CISPES' leaders would not have limited intrusion; it still would have left the FBI investigating lawful first amendment activities.

Although marked by many management errors, the CISPES case was not an aberration stemming from mismanagement.

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<sup>62</sup> *Id.* at 374.

<sup>63</sup> *Id.* at 406.

<sup>64</sup> *Id.* at 410-13.

Rather, the CISPES debacle can be traced directly to the lack of a criminal standard in the investigation of international terrorism.

### *B. Other Investigations*

In addition to CISPES and its spin-offs, other FBI investigations obtained information on Central American solidarity groups and foreign policy critics. There was an FBI investigation captioned "Salvadoran Leftist Activities in the U.S." The FBI investigated "Nicaragua Proposed Demonstrations in the U.S." in eighteen cities. In 1986, a year after the CISPES case was closed, the FBI Chicago field office reported on peaceful demonstrations held by the Pledge of Resistance as part of a file captioned "Nicaraguan Terrorist Matters."<sup>65</sup> The FBI opened an investigation of the Latin America Support Committee after the CISPES case was closed.<sup>66</sup>

### *C. Surveillance of Demonstrations*

The Senate Intelligence Committee noted in its report on the CISPES investigation that "[a]n undetermined but substantial amount of information about protest demonstrations by a wide range of groups across the ideological spectrum is acquired, maintained and disseminated by the FBI without active investigation. Many if not most of the demonstrations pose no threat to public safety."<sup>67</sup>

The FBI collected some of this information under specific investigations, as in the CISPES case. It obtained other information under a general case classification for investigations concerning civil disobedience and demonstrations. Between 1959 and 1976, the FBI created over 34,000 files at headquarters (although not all cases have to be referred to headquarters). Since 1976, when the Levi guidelines took effect, activity in this classification decreased dramatically. Since 1976, only 763 files have been opened.<sup>68</sup>

### *D. 1990 GAO Report*

Immediately after learning the scope of the CISPES investiga-

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<sup>65</sup> *Id.* at 435; see also SENATE INTELLIGENCE COMM. REP. ON CISPES, *supra* note 11, at 80-86.

<sup>66</sup> Doyle, *Fresno Group Probed by FBI*, Fresno Bee, Jan. 29, 1990, at A1.

<sup>67</sup> SENATE INTELLIGENCE COMM. REP. ON CISPES, *supra* note 11, at 5.

<sup>68</sup> Letter from FBI director William S. Sessions (Dec. 18, 1989) (on file with Subcommittee on Civil and Constitutional Rights).

tion in early 1988, I requested the General Accounting Office ("GAO") to audit the FBI's international terrorism program. This, the first independent examination of the Bureau's international terrorism investigations, was for the purpose of revealing whether the CISPES case was an aberration, as the FBI claimed, or whether it reflected broader issues in the FBI's approach to international terrorism.<sup>69</sup>

The GAO<sup>70</sup> found that between January of 1982 and June of 1988, the FBI opened and closed about 19,500 international terrorism cases. In ninety-nine percent of the closed cases, the investigative record filled only one or two file folders, indicating that the investigation was not extensive.<sup>71</sup> But the existence of 19,500 cases over a six and one-half year period, even if most were limited to one or two volumes of information, means that the FBI collected as many as 30,000 volumes of data on groups and individuals.

The GAO's most significant finding relates to the number of cases that were opened on subjects who were not suspected of being directly involved in terrorist activity. Of the 158 cases that the GAO examined in detail, forty-four percent contained no allegation

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<sup>69</sup> The following statistics on international terrorism, based on reports and testimony by the FBI, may provide a context for the GAO report:

There have been no terrorist acts carried out in the United States by international groups since 1983, when 11 of the 31 recorded incidents were attributable to international groups. In 1982, 15 of 51 terrorist incidents in the United States were by international groups.

The FBI has claimed credit for preventing 22 terrorist incidents by international groups from 1982 through 1988. This figure reflects some estimation. For example, the FBI claims credit for preventing three incidents in November of 1984 when it arrested a group of Indian Sikhs who allegedly were plotting the assassination of the Indian Prime Minister and another Indian official visiting the United States, and also estimates that three incidents were prevented in December of 1984 when the Department of State expelled a Libyan diplomat who was encouraging pro-Qadhafi students to carry out acts of violence against Libyan dissidents.

Since late 1984, the FBI has had jurisdiction to conduct investigations of terrorist incidents against United States citizens outside the United States. In 1985 and 1986, the FBI conducted four terrorist investigations outside the United States.

<sup>70</sup> See GENERAL ACCOUNTING OFFICE, INTERNATIONAL TERRORISM: FBI INVESTIGATES DOMESTIC ACTIVITIES TO IDENTIFY TERRORISTS (1989) [hereinafter GAO REPORT], reprinted in *Subcomm. Hearings on FBI Investigation of First Amendment Activities*, *supra* note 4, at 112-57.

<sup>71</sup> Most—nearly 68%—of the FBI's international terrorism cases are closed because no evidence was uncovered linking the subject to international terrorism or terrorist acts. *Id.* at 115. This further reinforces the finding that most of the FBI's cases do not involve the investigation of actual terrorists, but rather involve the pursuit of allegations or suspicions later found to be unsubstantiated. In another 22%, the cases "were closed because the subject moved or could not be located." *Id.* at 117.

of the individual's criminal behavior or membership in a terrorist group, but only a suspicion of the subject's association with or link to a terrorist group.<sup>72</sup> As in the CISPES spin-offs, the predicate link was sometimes very tenuous—the subject attended a meeting or had a contact with a group or an individual.<sup>73</sup> In one case, the FBI opened an investigation on a group simply because it was named in a brochure distributed by another group already under surveillance.

The GAO also found that the FBI monitored meetings, demonstrations, religious services, or other first amendment activities in eleven percent of the 19,500 international terrorism cases. This would mean that at least 2,000 investigations were undertaken between 1982 and 1988 where the FBI monitored first amendment activities.<sup>74</sup>

Moreover, in reviewing actual case files in seventy investigations whose only basis was the subject's suspected association with or link to a terrorist group, the GAO found the FBI inspecting first amendment activities seventy-four percent of the time. Thus, in cases opened without a criminal predicate, the FBI was most likely to monitor first amendment activities.

#### *E. Amnesty International*

In 1989, Amnesty International provided my subcommittee with documentation showing that over the past two years the FBI had interviewed over two dozen Amnesty members who had written to diplomatic establishments of the Soviet Union and other Communist countries. Those interviewed included school teachers, doctors, business professionals, housewives, students, and government employees. With one exception, all had written to Soviet or East Bloc embassies on behalf of political prisoners.<sup>75</sup>

The interviews lasted anywhere from a few minutes to an hour. In several cases, FBI agents telephoned or visited people at work. Many of those interviewed found the agents were polite and unintimidating, but many also sensed an implication of wrongdoing.

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<sup>72</sup> *Id.* at 131.

<sup>73</sup> *See, e.g., id.* at 133-35 (discussing five cases where basis for investigation was attendance at meeting, participation in religious services, or being listed in foreign newspaper article).

<sup>74</sup> *Id.* at 132-33.

<sup>75</sup> *Subcomm. Hearings on FBI Investigation of First Amendment Activities, supra* note 4, at 112.

ing. Given that FBI agents generally conduct interviews by asking open-ended questions and avoiding the disclosure of how the contact came to the Bureau's attention, the Amnesty members faced vague questions such as, "Have you been in contact with any Soviets lately?" Many of those interviewed expressed both confusion and anger that the FBI would scrutinize their human rights work. Several said that they worried about the adverse effects on their employment. In one case, the FBI agent had characterized his interview as an educational visit. In other cases, the interviewees felt that they were being lectured by the FBI agents or warned that their efforts could be exploited by the Soviets. In all cases, the visit or interview resulted in an FBI file on the Amnesty member.<sup>76</sup>

As part of the same effort, the FBI has interviewed children doing school projects, grammar school teachers, and citizens unaffiliated with any group.<sup>77</sup> One citizen in Ohio wrote to tell me that for many years he had been writing to foreign embassies in Washington, usually to voice his opinion about what he considered to be unfair, repressive, or disagreeable policies of foreign governments. In October of 1988, an agent from the Cleveland office of the FBI paid him a visit at his place of work to inquire about the general purpose of such letters and to discover the type of work in which the subject was involved.<sup>78</sup>

#### *F. Library Awareness Program*

It was revealed in 1988 that the FBI had regularly visited public and university libraries and, in the name of foreign counterintelligence, sought information regarding the readers of unclassified technical and scientific journals.<sup>79</sup> The visits fell under two justifications: a systematic program in New York City designed to develop counterintelligence awareness among librarians at technical and scientific libraries, and visits to libraries around the country when the FBI believed that a foreign national under their attention may have used the library. Both justifications comported with the FBI's assumption that its authority and responsibility extend even to the investigation of the lawful activities of certain for-

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<sup>76</sup> *Id.* at 9-15.

<sup>77</sup> The Center for Constitutional Rights in New York also has collected reports of FBI visits.

<sup>78</sup> Letter on file with Subcommittee.

<sup>79</sup> See *FBI Library Visits*, *supra* note 6, at 1.

eign nationals. With such a broad underpinning, it is not surprising that the program led to incidents in which FBI agents asked librarians to be wary of "foreigners" or persons with "East European or Russian-sounding names."

### *G. Chilling Effect*

There is a chilling effect when the FBI sends agents to question people as to their political activities. The word generally circulates quickly among the other members of a politically active group that the FBI has been to visit somebody, and has asked about a trip to Nicaragua, or about the group's activities, membership, or funding.

While the FBI may respond that its intent is not to intimidate nor even to conduct interviews in a threatening manner, its agents' visits may chill the exercise of first amendment rights.<sup>80</sup> This can reduce the level of political activities in which the group's members engage. Asking Americans why they have had a facially legitimate contract with a foreign national turns the presumption of innocence on its head. Americans should not have to account to the FBI for their actions unless the FBI suspects criminal behavior on their part.

### V. A PROPOSED RESPONSE: H.R. 50

I have therefore proposed legislation<sup>81</sup> (along with my colleague John Conyers, Jr.), that would apply a criminal standard to all of the FBI's investigative activities targeted at United States citizens and permanent resident aliens. The criminal standard is already a tested feature of the FBI's domestic security program. Since 1976, the FBI has adhered to a criminal standard in all of its investigations of domestic terrorism, opening and pursuing an investigation only when it has reason to believe that a crime has been, is being, or will be committed. Under this standard, the Bureau has been highly successful in identifying and arresting members of violent groups.

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<sup>80</sup> An FBI memorandum of September 1970 evidences the FBI's awareness that its interviews could inhibit first amendment activity. The memorandum stated that such questioning could "enhance the paranoia in these circles and will further serve to get the point across that there is an FBI agent behind every mailbox." See *Socialist Workers' Party v. Attorney Gen.*, 642 F. Supp. 1357, 1389 (S.D.N.Y. 1986) (quoting FBI memorandum).

<sup>81</sup> H.R. 50, 102d Cong., 1st Sess., 137 CONG. REC. E69 (1991) (my floor statement introducing bill).

The criminal standard is objective. It grounds the FBI's activities in the criminal statutes, not the vague and sometimes classified Executive Branch directives. It has specific goals—arrest and prosecution—and produces definitive results—convictions—which are obtained only after a court's scrutiny of the case. The adoption of a criminal standard for all investigations of Americans will give the FBI's counterintelligence program the focus now lacking. The result could be the reallocation of a considerable portion of the FBI's resources to more pressing criminal matters, such as the savings and loan debacle.

H.R. 50 would require the FBI to follow a criminal standard in opening and conducting cases that may relate to the collection of information involving first amendment rights. Our bill would establish in legislation a simple principle: The Federal Bureau of Investigation should not be monitoring first amendment activities—interviewing letter writers, visiting libraries, taking pictures at demonstrations, collecting leaflets and publications—without some direct relevance to the investigation of criminal activity. H.R. 50 would require the FBI to define the scope of its investigations of Americans with greater specificity.

The criminal standard in the Levi guidelines has not hampered the FBI in its effort to keep domestic terrorism under control. To the contrary, the FBI has succeeded in making important arrests and putting members of dangerous domestic terrorist groups in jail. The FBI should adhere to the same standard in investigating international terrorism.

The legislation would not hinder the FBI from acting to prevent terrorist acts before they occur. Under H.R. 50, if the FBI receives credible information that an individual or group intends to carry out illegal acts, the Bureau could investigate. The CISPES case occurred in part because the Bureau lacked clear guidelines on how to investigate groups that "support" terrorism. H.R. 50 has a simple rule: The FBI can investigate any support activities that are *illegal*. The FBI, however, would not be free to investigate broadly a United States group that "supports" a foreign entity our government has labeled terrorist if the domestic group itself is not engaged in illegal activity.

Not only does the bill adopt the FBI's own standard applicable to investigations of domestic terrorism (followed with great success since 1976), but its protection extends only to the investigation of "U.S. persons," defined as United States citizens and per-

manent resident aliens. Therefore, under the bill, the FBI would be able to continue investigating all activities, including lawful first amendment activities, of foreign nationals. Thus, the bill gives the FBI the latitude to monitor Soviet nationals or Arab nationals even in the absence of a reasonable belief that a law was being violated.

In appearances before House and Senate committees examining the CISPES case, the Director of the FBI testified that the secret Attorney General guidelines under which the FBI operates did not contain sufficient guidance and specificity concerning the investigation of groups that "support" international terrorism.<sup>82</sup> While the Justice Department responded to this problem by amending the guidelines, I believe that their changes were inadequate. The proposed legislation would provide that guidance and specificity by establishing a criminal standard for all FBI investigations that may involve surveillances of the exercise of first amendment rights. It would more clearly define the words "aiding or abetting" in the current Attorney General guidelines,<sup>83</sup> thereby specifying that the FBI can investigate domestic group activities that implicate the first amendment only if the activities involve illegal conduct.

The proposed legislation also provides that once the FBI opens an investigation, it may seek to gather only information relevant to federal criminal offenses. Thus, in predication and in scope, the bill would explicitly tie the FBI's counterterrorist and counterintelligence investigations of American citizens to the criminal laws.

The bill also addresses the question of the proper treatment of a closed file in which the FBI improperly collected information on first amendment activities. The legislation would require the FBI to dispose of the records in a manner that protects the individuals whose names appear in those files. It would prohibit both the circulation of the records within the Bureau and their dissemination without the Bureau except to requesters under the Freedom of Information Act and the Privacy Act. The records would thereby be preserved for historical purposes and be available to the record subjects, who have a right to know the surveillance to which they were subject.

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<sup>82</sup> House Subcomm. Hearings on CISPES, *supra* note 11, at 143.

<sup>83</sup> See *supra* notes 47-48 and accompanying text.



In addition to reforming the FBI's mission in this new era, other necessary steps to end the Cold War at home include:<sup>84</sup>

1. *Reduce the amount of information that is classified and kept from the American public in the name of national security.* Fundamental to our concept of democracy is the existence of an informed public. Yet the federal government classifies millions of pages of information on critical policy matters and criminalizes its public disclosure. In 1985, the staff of my subcommittee found that a large percentage of classified information was classified needlessly.<sup>85</sup> The right to classify and deny the release of information rests largely on executive orders. Congress should enact legislation that clearly limits the categories of information that can be classified. As a start, the guidelines governing FBI investigation should be declassified.

The budgets of the intelligence agencies and the Pentagon's procurement programs also should be declassified, so that the American public can learn how their taxes are being used. Similarly, much of the economic intelligence collected from open sources should be declassified and made available to American businesses and corporations. I note in this respect that Senator Moynihan has introduced legislation to make public the overall budget amount of the intelligence community, as well as to abolish the Central Intelligence Agency and transfer its functions to the Department of State.<sup>86</sup>

2. *Establish clear standards and due process rights for security clearance determinations.* Over three million government and private sector employees are required to obtain and maintain security clearances as a condition of employment. Under obscure standards that originated in the 1950's, employees are required to undergo intensive scrutiny of sexual, financial, physical, and mental health aspects of their lives. Yet government employees are not entitled to a hearing when a decision is made to deny or revoke

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<sup>84</sup> Morton Halperin and Jeanne Woods of the Center for National Security Studies have outlined some of these steps in their article "*Ending the Cold War at Home*," 81 FOREIGN POL'Y 128, 138-43 (1990-91).

<sup>85</sup> *Preliminary Joint Staff Study on the Protection of National Secrets* (Oct. 25, 1985), reprinted in *Protection of Classified Information: Joint Hearing Before the Subcomm. on Civil Service of House Comm. on Post Office and Civil Service and the Subcomm. on Civil and Constitutional Rights on the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 44 (1987).

<sup>86</sup> See S. 236, 102d Cong., 1st Sess., 137 CONG. REC. S987 (daily ed. Jan. 17, 1991) (remarks of Senator Moynihan).

a clearance.

It is well recognized that spies are rarely motivated by ideology; security clearance decisions are more frequently based on non-ideological grounds such as drug use, alcohol abuse, or financial need. Yet most components of the defense community still make security decisions without due process. The legitimate need for the government to evaluate the trustworthiness of employees in sensitive positions can be satisfied without infringing the due process rights that our nation generally recognizes as the guarantees of fairness, accuracy, and reliability.

3. *Eliminate ideologically-based restrictions on international travel.* The rights of Americans to be exposed to persons and ideas from abroad are restricted in two ways: the exclusion of foreigners seeking to visit the United States, and limits on the ability of Americans to travel abroad.

Despite congressional action in recent years to eliminate many of the ideological exclusions in the McCarran Walter Act,<sup>87</sup> the government still excludes, usually under the rubric of terrorism, foreigners who have not engaged and are not expected to engage in illegal activity. Members of the Palestine Liberation Organization are specifically excepted from the new reforms and are still excluded under the Immigration and Nationality Act. Under an Executive Order issued by President Ronald Reagan in 1985, most Cubans and Cambodians are barred entry to this country as well.<sup>88</sup>

Throughout much of the Cold War, the government declared entire countries off-limits by prohibiting the use of United States passports for travel. Although in 1978 Congress amended the Passport Act to prohibit the imposition of area restrictions on political grounds, the Executive Branch continues to use the economic embargo laws to ban travel by Americans to certain countries. Today, travel to Cuba, Libya, Vietnam, Cambodia, and North Korea is still severely restricted.

Restrictions on the ability of foreigners to visit the United States or of United States citizens to travel abroad are incompatible with the purposes of the first amendment and should be eliminated in their entirety.

4. *Prohibit warrantless searches.* The Executive Branch asserts that it has the inherent power to break into homes without a

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<sup>87</sup> 8 U.S.C. §§ 1101-1557 (1990).

<sup>88</sup> See Proclamation No. 5377, 50 Fed. Reg. 41,329 (1985).

warrant or notice—even when it lacks probable cause of any criminal conduct.<sup>89</sup> Congress should firmly declare that there is no national security exception to the fourth amendment.

## VI. CONCLUSION

The Cold War is ending, offering immense opportunities for freedom-promoting changes in the international order. During this crucial time, we must reexamine and revise the controls that the United States government exercises, in the name of national security, over its own citizens. We must not allow the Persian Gulf War to distract us from this task.

For most of this century, America's domestic intelligence agencies, primarily the FBI, have been given wide latitude to operate. The resulting surveillance of peaceful political activities that are not only lawful, but protected under the first amendment, constitutes an invasion of civil liberties that is now clearly without justification.

During the Cold War, communism was viewed as a real threat to the survival of our society. The supposed vulnerability of the United States—a vulnerability which I believe never existed—was cited as justification for government intrusiveness. Communism no longer poses an immediate threat to the foundations of the United States. The end of the Cold War offers a timely opportunity to discard legislatively the philosophy that justified such surveillance and to adopt solid legal protections against its reemergence.

We must reexamine the role that domestic surveillance should play in this new era of international relations. For both theoretical and practical reasons, counterintelligence operations targeting foreign nationals and their contacts with American citizens cannot continue under a Cold War mentality. We must dislodge such intelligence actions from their secure realm of secrecy and expose them to greater scrutiny from the American citizens whose liberties they affect. Regaining the civil liberties lost in the Cold War may be the most precious peace dividend of all.

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<sup>89</sup> See Exec. Order No. 12333, *supra* note 50.